

STATE OF MICHIGAN  
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals  
(Before Owens, P.J., and Schuette and Borrello, J.J.)

TAXPAYERS OF MICHIGAN AGAINST  
CASINOS, and LAURA BAIRD, State  
Representative in her official capacity,

Plaintiffs/Appellees,

Supreme Court No. 129818

v.

Court of Appeals No. 225017

THE STATE OF MICHIGAN,

Ingham County Circuit Court  
No. 99-90195-CZ

Defendant/Appellant,

and

GAMING ENTERTAINMENT, LLC,  
and LITTLE TRAVERSE BAY BANDS  
OF ODAWA INDIANS,

Intervening Defendants/Appellees,

and

NORTH AMERICAN SPORTS  
MANAGEMENT CO.,

Intervening Defendant.

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**BRIEF OF STATE OF MICHIGAN AS APPELLANT**

**THIS APPEAL INVOLVES A RULING THAT A PROVISION  
OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION,  
OR OTHER STATE GOVERNMENTAL ACTION IS INVALID**

**ORAL ARGUMENT REQUESTED**

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## **BASIS OF JURISDICTION**

This Court has jurisdiction pursuant to MCR 7.301(A)(2) to review the 2-1 ruling of the Court of Appeals dated September 22, 2005 that decided a constitutional issue remanded to the Court of Appeals by this Court. In *Taxpayers of Michigan Against Casinos v State of Michigan*, 471 Mich 306; 685 NW2d 221 (2004) ("*TOMAC I*"), this Court held that gaming compacts ("Compacts") between the State and four Indian tribes ("Tribes") were properly approved by legislative resolution and did not require legislation because they were contractual in nature. *TOMAC I* also remanded a narrow issue to the Court of Appeals: whether the provision in the Compacts setting forth the substantive and procedural requirements for their amendment violated the Separation of Powers Clause of the Michigan constitution, Const, 1963, art 3, §2. On remand, the Court of Appeals' majority held that the Legislature violated that constitutional provision because it "delegated" amending authority to the Governor by resolution rather than by a statute. As a result of this holding, the Court of Appeals reinstated the judgment of the Ingham County Circuit Court granting Plaintiffs Taxpayers of Michigan Against Casinos and Representative Laura Baird (jointly, "*TOMAC*" or "Plaintiffs") summary disposition on that issue. The Court of Appeals also held that the amendment of the Compact between the State and the Little Traverse Bay Bands of Odawa Indians violated the Separation of Powers Clause solely because it was entered into pursuant to the amendatory procedure which the Court of Appeals had found to be constitutionally invalid. The Circuit Court did not have an opportunity to review that issue since the amendment was entered into after that court rendered its decision.

Because the decision of the Court of Appeals was in error, this Court should reverse that court's judgment invalidating the amendment provision of the Compacts and the LTBB Amendment.

## **QUESTION PRESENTED**

- I. Did the Legislature act consistently with the Separation of Powers Clause of the Michigan constitution when it adopted a concurrent resolution approving a gaming compact between the State and an Indian Tribe that included a provision allowing an amendment of the Compact within specific limitations upon mutual agreement of the Governor and the Tribal Chairperson?

The Circuit Court answered:	"No."
The Court of Appeals answered:	"No."
Little Traverse Bay Bands answers:	"Yes"
The State answers:	"Yes."

## **SUMMARY OF MATERIAL FACTS AND PROCEEDINGS**

### **1. FACTS.**

In 1998, Governor Engler signed gaming Compacts with four Native American tribes located in Michigan, pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 USC §2701, *et seq.*<sup>1</sup> Each Compact provided that it would not take effect until it was approved by a concurrent resolution of the Michigan Legislature. That approval came when the Legislature approved the Compacts by passing House Concurrent Resolution ("HCR") 115 on December 10 and 11, 1998.

The Compacts approved by the Legislature contained a procedure for amending the Compacts ("Amendment Provision"). (Compact, §16; App at 78a-79a.) The Amendment Provision reads in relevant part as follows:

This Compact may be amended by mutual agreement between the Tribe and the State as follows:

- (A) The Tribe or the State may propose amendments to the Compact by providing the other party with written notice of the proposed amendment as follows:
  - (i) The Tribe shall propose amendments pursuant to the notice provisions of this Compact by submitting the proposed amendments to the Governor who shall act for the State.
  - (ii) The State, acting through the Governor, shall propose amendments by submitting the proposed amendments to the Tribe pursuant to the notice provisions of this Compact.
  - (iii) Neither the tribe nor the state may amend the definition

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<sup>1</sup>A copy of a representative Compact is attached at App 63a-84a.



of "eligible Indian lands" to include counties other than those set forth in Section 2(B)(1) of this Compact.

\* \* \*

- (B) The party receiving the proposed amendment shall advise the requesting party within thirty (30) days as follows:
  - (i) That the receiving party agrees to the proposed amendment; or
  - (ii) That the receiving party rejects the proposed amendment as submitted and agrees to meet concerning the subject of the proposed amendment.
- (C) Any amendment agreed to between the parties shall be submitted to the Secretary of the Interior for approval pursuant to the provisions of the IGRA.
- (D) Upon the effective date of the amendment, a certified copy shall be filed by the Governor with the Michigan Secretary of State and a copy shall be transmitted to each house of the Michigan Legislature and the Michigan Attorney General.

Under this provision, the parties agreed that the State would be bound by the consent of the Governor in proposing and accepting amendments to the Compact, subject to specified limitations and procedures. One important limitation is that no amendment may change the definition of "eligible Indian lands" to include additional counties. (Compact, §16(A)(iii); App at 78a.) Because a Tribe's gaming activities are restricted to "eligible Indian lands", which are the trust and reservation lands that are identified in the Compacts, (see Compact, §§2(B)(1), 3(A); App 65a-66a), the Amendment Provision precludes the parties from amending the Compact to permit the Tribe to expand gaming into other geographic areas. If the Governor and the tribal Chairperson agree to an amendment, it must be submitted to the Secretary of the Interior for approval. (Compact, §16(C); App at 79a.) Upon the effective date of the amendment, a certified copy is to be

filed with the Michigan Secretary of State and transmitted to each house of the Michigan Legislature and the Michigan Attorney General. (Compact, §16(D); App at 79a.)

On July 22, 2003, Governor Granholm consented to an amendment to the Compact between the State and the Little Traverse Bay Bands of Odawa Indians ("LTBB Amendment").<sup>2</sup> The LTBB Amendment permitted the construction of a second casino on the LTBB's eligible Indian lands. The specific location of that casino is contingent upon the approval by the local unit of government.

## **2. PROCEEDINGS.**

### **a. Nature of the Case.**

The proceedings in this case are complex and long, spanning nearly seven years. They began on June 10, 1999, when TOMAC filed this action in the Ingham County Circuit Court ("Circuit Court"). TOMAC sought a declaration that the Compacts were unconstitutional on the theory that they were legislative in nature. In Count I of its Complaint, TOMAC claimed that the Legislature's approval of the Compacts by concurrent resolution violated Const 1963, art 4, §22 of the Michigan constitution, which requires that all legislation be by bill. Count II asserted that the State violated the Local Acts Provision, Const 1963, art 4, §29 because the Legislature failed to treat the Compacts as local or special acts. Finally, Count III alleged that the Compact's amendment procedure that gave the Governor authority to agree to an amendment on behalf of the State violated the Separation of Powers Clause, Const 1963, art 3, §2.

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<sup>2</sup>A copy of the LTBB Amendment is attached at App at 86a-89a

**b. The Circuit Court's Decision.**

The State and TOMAC each filed a motion for summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10), respectively. The State argued that the 1998 Compacts were not legislative in nature and that the Legislature properly approved them by concurrent resolution, just as it had approved the 1993 Compacts. TOMAC argued the contrary position.

The cross motions were heard on December 3, 1999. The Circuit Court issued its Opinion and Order on January 18, 2000. (Dkt #2.)<sup>3</sup>

The Circuit Court held that the concurrent resolution approving the Compacts was "legislation" because the Compacts are legislative in nature. On that basis, the Circuit Court ruled that the Legislature's action violated Const 1963, art 4, §22. Thus, the Circuit Court granted TOMAC's motion for summary disposition, and denied the State's motion for summary disposition, on Count I. On the same basis, the Circuit Court concluded that the amendment provision of the Compacts "unconstitutionally grants the Executive branch legislative authority in violation of the Michigan Constitution[.]" specifically, the Separation of Powers Clause. Thus, the Circuit Court denied the State's motion for summary disposition on Count III and granted TOMAC's motion on that count. Finally, the Circuit Court rejected TOMAC's contention in Count II that the Compacts violated the Local Acts provision of the Michigan Constitution, Const 1963, art 4, §29.

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<sup>3</sup>Docket Numbers ("Dkt #") refer to the document number in the docket that is included in App at 1a-15a.

**c. The First Court of Appeals' Decision.**

On February 4, 2000, the State timely filed in the Court of Appeals a claim of appeal from the Circuit Court's January 18, 2000 order. (Dkt #1.) TOMAC timely filed a claim of cross-appeal.

The Court of Appeals reversed the Circuit Court's rulings on Counts I and III and affirmed the Circuit Court's ruling on Count II. See *Taxpayers of Michigan Against Casinos v State of Michigan*, 254 Mich App 23; 657 NW2d 503 (2002). The Court of Appeals found that the Compacts were not legislative in nature because IGRA preempts state regulation of gaming on Indian lands. *Id*, 254 Mich App at 46. Moreover, the Court of Appeals found that Michigan law does not prescribe any method for the approval of State-tribal gaming compacts, but that the Legislature had historically approved contracts, and IGRA compacts in particular, by resolution. *Id*, 254 Mich App at 47-48. Thus, the Court of Appeals concluded that a resolution was a sufficient means of legislative approval. *Id*. The Court of Appeals did not decide the Separation of Powers challenge to the amendment provision. It held that the issue was not ripe for review since the State had not yet sought to amend the Compacts. *Id*. Finally, the Court of Appeals affirmed the Circuit Court's ruling that the Compacts did not violate the Local Acts provision of the Michigan constitution, although on different grounds.

TOMAC applied for leave to appeal the Court of Appeals' ruling to this Court on December 3, 2002. (Dkt #73.) This Court granted leave on September 25, 2003. (Dkt #84.)

**d. This Court's Decision in *TOMAC I*.**

In *Taxpayers of Michigan Against Casinos v State of Michigan*, 471 Mich 306; 685 NW2d 221 (2004) ("*TOMAC I*"), this Court, in that landmark decision, affirmed the Court of Appeals. This Court held that legislation is "unilateral regulation", and it emphasized that this characteristic "distinguishes legislation from contracts." *Id*, 471 Mich at 318. Because the "Legislature could not have unilaterally exerted its will over the tribes . . .", this Court reasoned, "the compacts can only be described as contracts, not legislation." *Id*, 471 Mich at 319.

In further support of its holding, this Court found that none of the terms of the Compacts had the characteristics of legislation. For example, "the compacts . . . do not apply to the citizens of the state of Michigan as a whole; they only bind the two parties to the compact"; the "Legislature has not dictated the rights or duties of those other than the contracting parties"; and the "Legislature has no obligations regarding the regulation of gaming whatsoever, nor can the state unilaterally rectify a violation of the compacts." *TOMAC I*, 471 Mich at 324, 325.

This Court also found that the Legislature had the power to approve the Compacts by resolution. It found that the Legislature has power to contract unless there is a constitutional limitation. *TOMAC I*, 471 Mich at 328. Because there are no constitutional restrictions on the Legislature's power to bind the State to a compact with a tribe, and the constitution does not prescribe the method for doing so, this Court concluded that the "Legislature has the discretion to approve the compacts by resolution." *Id*. Furthermore, "the courts cannot interfere with that legitimate exercise of legislative discretion." *Id*, 471

Mich at 329.

This Court did not resolve the issue of whether the Amendment Provision or any particular amendment to the Compacts violated the Separation of Powers Clause. The Court found that the LTBB Amendment, which had been executed by the Governor on behalf of the State while this case was pending before it, made the issue ripe for review. But because the “lower courts [had] not yet been able to assess this issue since the amendments”, this Court remanded this case to the Court of Appeals for further consideration. *TOMAC I*, 471 Mich at 333.

The lead opinion and Justice Kelly’s concurring opinion, in which Justice Cavanaugh joined, directed the Court of Appeals to consider two distinct issues. The lead opinion instructed the lower court to consider “whether the *provision* in the compacts purporting to empower the Governor to amend the compacts without legislative approval violates the separation of powers doctrine . . . .” *TOMAC I*, 471 Mich at 333 (emphasis supplied). Justice Kelly, however, found that the “amendment provision of the compacts survives a facial challenge to the Separation of Powers clause . . . .” *Id*, 471 Mich at 349. In her view, the Court of Appeals was to consider only whether the application of that provision in the LTBB Compact violated the Separation of Powers Clause. “[A] majority of the Court agrees that the issue whether the Governor’s *recent amendments* violate the Separation of Powers Clause should be remanded for Court of Appeals consideration.” *Id*, 471 Mich at 350 (emphasis supplied.)

**e. The Court of Appeals' Decision on Remand.**

On remand, the Court of Appeals directed the parties to address both issues identified by the Justices of this Court. As stated in its October 8, 2004 order (Dkt #121), the court directed the parties to brief:

(1) whether the provision in the tribal-state gaming compact of the Little Traverse Bay Band of Odawa Indians, purporting to allow the governor to amend the compact without legislative approval, violates the separation of powers clause, Const 1963, art 3, § 2, (2) assuming that the amendment provision in the compact is constitutional, whether any aspect of the exercise of the power to amend violated the separation of powers clause, Const 1963, art 3, § 2, and (3) what effect will there be on the amendment as a whole if an aspect of the amendment violates the separation of powers clause.<sup>4</sup>

The panel on remand consisted of Judges Owens, Borrello and Schuette.<sup>5</sup> On October 29, 2004, the State and the LTBB filed a joint motion to disqualify Judge Schuette.<sup>6</sup> (Dkt #124.) The parties sought Judge Schuette's disqualification because, as a state senator, Judge Schuette had strongly opposed approval of the Compacts on both policy and constitutional grounds and, in furthering that opposition, worked directly with TOMAC and its present counsel. On November 24, 2004, Judge Schuette denied the parties' motion. (Dkt #140.)

On September 22, 2005, the Court of Appeals issued a split decision affirming the

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<sup>4</sup>The order also granted LTBB's motion to intervene.

<sup>5</sup>Judges Schuette and Borrello replaced original panel members Judges Hood and Holbrook, who had retired.

<sup>6</sup>On this same day, TOMAC filed a Petition for Writ of Certiorari with the Supreme Court of the United States seeking review of this Court's holding that the Compacts did not constitute legislation under the Michigan constitution. The Supreme Court denied TOMAC's petition on February 22, 2005.

Circuit Court's holding that the Amendment Provision violated the Separation of Powers Clause of the Michigan constitution. See *Taxpayers of Michigan Against Casinos v State of Michigan (On Remand)*, Case No. 225017 (9/22/05) ("*TOMAC (On Remand)*").<sup>7</sup> Judge Schuette wrote for the majority. Judge Borrello filed a dissent which the majority described as "eloquent and well-reasoned." *TOMAC (On Remand)*, p 10, App at 25a. (The slip opinions of the majority and the dissent are attached at App at 16a-34a.)

The majority held that the Amendment Provision in each of the Compacts violated the Separation of Powers Clause because "it grants amendatory power solely to the Governor without legislative approval." *TOMAC (On Remand)*, p 7; App at 22a. This holding was based solely on the authority of *Roxborough v Michigan Unemployment Compensation Comm*, 309 Mich 505; 15 NW2d 724 (1944). The majority interpreted *Roxborough* as endorsing the rule that "[g]enerally, only persons authorized by the state constitution or a statute can make a contract binding on a state. . . ." *TOMAC (On Remand)*, p 9 quoting 72 Am Jur 2d, States, Territories and Dependencies, §71, p 457; App at 24a. The majority went on to reason that "[h]ere, the delegation of authority to amend a gambling compact, was conferred by a resolution, a nonstatutory means. The nonstatutory nature of a resolution fails the *Roxborough* requirement that a valid delegation of legislative authority to the executive branch of government must be expressed in the Michigan Constitution or by means of a statute." *Id.* The Court of Appeals also invalidated the LTBB Amendment. It did so solely because the amendment was entered into pursuant to the Amendment Provision. *Id.*

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<sup>7</sup>The Court of Appeals' decision is reported at 268 Mich App 226; 708 NW2d 115 (2005).



The dissent disagreed with the majority's conclusion that the Amendment Provision permitted the Governor to amend the Compacts without the approval of the Legislature.

[The] Legislature, in approving the compacts by resolution, also approved the amendment process. . . . When the Legislature approved the compacts with the amendment provision, the Legislature effectively granted the Governor approval in advance of any amendments to the compacts. The legislative action authorized the Governor, in advance, to bind the state to any amendments. *TOMAC (On Remand) (Borrello, J, dissenting)*, p 3; App at 30a.

Judge Borrello concluded that *Roxborough* was inapplicable because the Governor's authority in that case did not derive from a contract validly approved by the Legislature.

"Irrespective of whether there was a statutory or constitutional authorization for the Governor to enter into or amend a compact on behalf of the state, I would conclude that the Governor did possess such authority *on the basis of the Legislature's valid approval of the compacts by resolution.*" *Id*, p 5; App at 32a (emphasis supplied).

The State, the LTBB and TOMAC applied for leave to appeal on November 3, 2005. (Dkt #s 151, 152, 153.) This Court granted all three applications on March 29, 2006. (Dkt #s 165, 166, 167.)

### **ARGUMENT**

In holding that the Amendment Provision violated the Separation of Powers Clause, the Court of Appeals fundamentally misunderstood the source of the Governor's amending authority. The Separation of Powers Clause restricts the Legislature's delegation of its powers to other branches of government. The Amendment Provision of the Compacts, however, does not constitute a unilateral delegation of legislative contracting power to the Governor. As this Court taught in *TOMAC I*, the Compacts are contracts. Like many

contracts, the Compacts provide a procedure for their modification. It is that agreed-upon procedure that provides the Governor with authority to act for the State. Thus, the source of the Governor's amending authority is a mutual agreement between the State and the Tribe, not a unilateral delegation of that authority by the Legislature. As this Court held in *TOMAC I*, a mutual agreement between the State and a Tribe may be approved by a resolution of the Legislature.

Rather than recognizing that the Governor's authority was contractual in origin, the Court of Appeals characterized it as resulting from the Legislature's *delegation* of that authority through the *unilateral* act of passing a resolution. Having started down the path of unilateral delegation, the Court of Appeals arrived at *Roxborough*, which considered the scope of authority delegated by statute. Had the court properly taken the analytical path of bilateral agreement, it would have ended at this Court's opinion in *TOMAC I*, and its conclusion that the Legislature may approve a contract, including its modification provision, by resolution.

**I. The Amendment Provision is Consistent with the Separation of Powers Doctrine.**

**A. Standard of Review.**

Whether the Amendment Provision of the Compacts violates the Separation of Powers Clause of the Michigan constitution is a constitutional question, which is reviewed *de novo*. *Harvey v State*, 469 Mich 1, 6; 664 NW2d 767 (2003). Furthermore, the Legislature's approval of the Compacts with the Amendment Provision included in it, and the Governor's exercise of her authority under that provision, are entitled to a presumption of constitutionality. *Young v City of Ann Arbor*, 267 Mich 241, 243; 255 NW

579 (1934) (“All presumptions are in favor of the constitutionality of the deliberate acts of a co-ordinate department of government”). Finally, the “burden of proving an alleged constitutional violation rests on the party asserting it.” *Morris v Metriyakool*, 107 Mich App 110, 116-117; 309 NW2d 910 (1981). The burden is heavy. This “allegation must be sustained not as a matter of speculation but as a demonstrable reality.” *Id* at 117.

**B. The Governor’s Authority to Bind the State to a Compact Amendment Is Not the Result of the Legislature’s Unilateral Delegation of that Authority.**

The Court of Appeals’ analysis turns on its assumption that the Amendment Provision expresses the Legislature’s unilateral “delegation” of amending authority to the Governor. Although the Separation of Powers doctrine restricts the Legislature from delegating its powers to another branch of government, the Amendment Provision, *being part of a bilateral agreement*, does not purport to be a legislative delegation of amending power to the Governor. Therefore, the Amendment Provision is consistent with the Separation of Powers doctrine.

The Michigan Constitution provides: “The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.” Const 1963, art 3, §2. Out of this separation of powers provision has grown “the constitutional discipline that is described as the nondelegation doctrine.” *Taylor v Gate Pharmaceuticals*, 468 Mich 1, 8; 658 NW2d 127 (2003). As explained by the United States Supreme Court, this doctrine “precludes Congress from delegating its legislative power to either the executive branch or the judicial branch.” *Id*,

citing *Field v Clark*, 143 US 649, 692; 12 SCt 495, 36 L Ed 294 (1892). Despite their importance, the “separation of powers principle, and the nondelegation doctrine in particular, do not prevent Congress [or our Legislature] from obtaining the assistance of coordinate Branches.” *Id* at 8-9 quoting *Mistretta v United States*, 488 US 361, 371; 109 SCt 647; 102 L Ed 2d 714 (1989) (bracketed text supplied by the *Taylor* Court).

The Amendment Provision is consistent with separation of powers and nondelegation principles because it does not purport to “delegate” to the Governor the Legislature’s power to amend the Compacts. As this Court has recognized, “the compacts can only be described as contracts . . . .” *TOMAC I*, 471 Mich at 319. Principles of contract law, therefore, apply to the Compacts. One “bedrock principle of American contract law [is] that parties are free to contract as they see fit . . . .” *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003). That “freedom to contract also permits parties to enter into new contracts or *modify their existing agreements*.” *Quality Products and Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 370-371; 666 NW2d 251 (2003) (emphasis supplied). Furthermore, the “contracting parties are at liberty to design their own guidelines for modification . . . of the rights and duties established by the contract[.]” *Id*, 469 Mich at 372. See also *Banwell v Risdon*, 258 Mich 274, 278-279; 241 NW 796 (1932). Such “restrictive amendment clauses” contain “the parties’ express statements regarding *their own ground rules* for modification [.]” *Quality Products*, 469 Mich at 374-375 (emphasis supplied).

Section 16 is a restrictive amendment clause that expresses the parties’ mutual “ground rules for modification” of the Compact. That provision plainly announces that it

sets forth an amendatory procedure: "*This Compact may be amended by mutual agreement between the Tribe and the State as follows . . .*" (Compact, §16; App at 78a; emphasis supplied.) The procedure that "follows" consists of these steps:

- The Tribe submits a proposed amendment to the Governor, who acts for the State; or the Governor, acting for the State, submits a proposed amendment to the tribal chairperson.
- No amendment may expand the geographic area in which the Tribe may engage in gaming.
- The receiving party (the Governor or the chairperson) agrees (or does not agree) to the proposed amendment.
- If the receiving party agrees, the amendment is submitted to the Secretary of the Interior for approval; and
- Upon the effective date of the amendment, the Governor files a certified copy with the Michigan Secretary of State, each house of the Michigan Legislature and the Michigan Attorney General.

Actions taken by the Governor pursuant to this procedure do bind the State. But they do so not because the Governor has exercised authority that has been "delegated" to her by the Legislature; rather, it is because the *parties agreed* that, in receiving amendments, the Governor "shall act for the State" and, in proposing amendments, the State "act[s] through the Governor[.]" (Compact, §16(A)(i) and (ii); App at 78a.)<sup>8</sup> This

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<sup>8</sup>Section 16 is not the only provision of the Compacts that gives authority to the Governor or other individuals to act on behalf of the State. See Compact, §§3(B) and 7. Section 3(B) describes the procedure for adding to the list of Class III games that may be lawfully conducted under the Compact. The agreed-upon procedure stipulates that the "Tribe shall request additional games by letter from the tribal Chairperson on behalf of the Tribe to the Governor on behalf of the State." (Compact, §3(B)(1); App at 67a.) The State responds to the request through the Governor: "The State acting through the Governor shall take action on the Tribe's request within ninety (90) days after receipt." (Compact, §3(B)(2); App at 67a.)

Under Section 7, which concerns dispute resolution, a party asserting non-  
(continued...)

amending authority, like all of the other terms of the Compact, is the product of the *mutual* assent of the State and the Tribe. “[R]estrictive amendment clauses are an *express mutual statement* regarding the parties’ expectations regarding amendments.” *Quality Products*, 469 Mich at 374 (italics in original; bold supplied). Thus, such amendment clauses are valid as a matter of *contract* law. See *Quality Products*, 469 Mich at 380 (restrictive amendatory clause enforced where there was no clear and convincing evidence that parties intended to modify substantive contract terms and the amendatory clause itself). In particular, amendatory clauses giving only a specific individual the authority to agree to the modification are recognized as valid and enforceable contract provisions. See, e.g., *Potomac Leasing Co v The French Connection Shops, Inc*, 172 Mich App 108, 114; 431 NW2d 214 (1988) (promise made by lessor’s employee to lessee did not bind lessor because lease required modification to be in writing signed by a “corporate officer of lessor.”), *Kovacs v Electronic Data Systems, Inc*, 762 F Supp 161, 164 (ED Mich, 1990) (under Michigan law, oral assurance by employer’s manager was unenforceable because employment agreement “requires approval by an officer of EDS before any modification to the employee agreement may become effective.”), *Batchelor v Sears, Roebuck & Co*, 574 F Supp 1480, 1486 (ED Mich, 1983) (under Michigan law, manager’s representations

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<sup>8</sup>(...continued)

compliance with the Compact serves notice of non-compliance on the other party. After service of the notice, “[r]epresentatives of the State and the Tribe shall thereafter meet within thirty (30) days in an effort to resolve the dispute.” (Compact, §7(A)(1); App at 73a-74A.) If the State’s representative and the Tribe’s representative do not resolve the dispute “to the satisfaction of the State” the “party [i.e., the State]” may serve upon the Chairperson a notice to cease the allegedly non-compliant activities. (Compact, §7(A)(2); App at 74a.) The Tribe may either cease those activities or invoke arbitration. This same procedure is followed if it is the Tribe that has not been satisfied with a resolution of an allegation of non-compliance by the State.

did not modify employment contract because “the terms of plaintiff’s employment contract preclude modification except by the president or vice-president of the company.”), *Vollrath v Georgia-Pacific Corp*, 899 F2d 533, 535 (CA 6, 1990) (under Michigan law, plant manager’s memorandum did not modify defendant’s at-will employment policy since “the written . . . at will policy specifically indicated that it could not be modified except by the Chief Executive Officer of the corporation.”)

Because the ultimate source of the Governor’s amending authority is the Compact itself, no statute was necessary to create that authority. The only action required by the Legislature was an expression of the State’s assent to the Compact that created that authority. As this Court held in *TOMAC I*, a resolution was sufficient to convey that assent.<sup>9</sup>

**C. The Legislature Has Approved Amendments Conforming to the Requirements of the Amendment Provision.**

The fact that the Governor was not unilaterally delegated amending power by the Legislature does not mean, as the Court of Appeals found, that amendments conforming to the parties’ ground rules are “without legislative approval.” *TOMAC (On Remand)*, p 7; App at 22a. The Legislature agreed to the “ground rules” for modifying the Compacts. In so doing, it expressed its approval of, and bound the State to, specific amendments that conformed to those guidelines.

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<sup>9</sup>A delegation of amending authority to the Governor by statute would have also been sufficient to give the Governor the authority to agree to an amendment. But it was not *necessary*. As this Court recognized in *TOMAC I*, “[l]egal rights and responsibilities may also be altered through contracts.” *TOMAC I*, 471 Mich at 318.

The language of the Compact establishes that the State and Tribe intended each party to be bound by amendments conforming to their agreed-upon modification guidelines. The “intent of the contracting parties is best discovered by the language actually used in the contract.” *Rory v Continental Ins Co*, 473 Mich 457, 469 n. 21; 703 NW2d 23 (2005). Section 16 states that the “Compact *may be amended* by mutual agreement between the Tribe and the State *as follows[.]*” (App at 78a; emphasis supplied.) This plainly means that an amendment conforming to the procedure stipulated in Section 16 of the Compact does reflect the parties’ “mutual agreement.” When the Court of Appeals held that amendments conforming to the parties’ amendatory guidelines lacked legislative approval, it wrote that language out of the Compact. Thus, it violated a “fundamental tenet of our jurisprudence . . . that unambiguous contracts are not open to judicial construction and must be *enforced as written*.” *Rory*, 473 Mich at 468 (emphasis in original).

Furthermore, any other treatment of Section 16 would render it meaningless. “The rules of construction require that all clauses of the contract be given an *effective and reasonable* meaning if fairly possible.” *City of Detroit v A.W. Kutsche & Co*, 309 Mich 700, 709; 16 NW2d 128 (1944) (emphasis supplied). It is not “effective and reasonable” to construe Section 16 in such a way that conforming amendments do not bind the State (or the Tribe). Such a reading would make the amendatory procedure pointless, for there is no purpose in parties agreeing to a procedure to amend a contract if the product of the procedure – an amendment – is not binding on the parties. The only way to give effect to the amendatory procedure is to interpret it as conveying the parties’ intent to be bound by



a conforming amendment. *Compare FJ Siller & Co v City of Hart*, 400 Mich 578, 582; 255 NW2d 347 (1977) (interpreting agreement for common law arbitration as intended to render final arbitration award because, otherwise, “[a]rbitration would be just a warmup, binding on no one.”)

Because the Legislature consented to conforming Compact amendments, those amendments stand on the same constitutional footing as the Compacts themselves. In *TOMAC I*, this Court held that the Legislature could express the State’s consent to the Compacts through a resolution because the constitution required no specific method of expression. *TOMAC I*, 471 Mich at 328. In passing HCR 115, the Legislature contractually bound the State to every specific agreement in the Compacts, *including its agreement to abide by an amendment conforming to the requirements of the Amendment Provision*. Therefore, such amendments are not “without legislative approval”, as the Court of Appeals erroneously concluded.<sup>10</sup> To the contrary, the Legislature did express the State’s consent to them.

**D. The Court of Appeals’ Reliance on *Roxborough* is Misplaced.**

The Court of Appeals rested its erroneous holding on a single case – *Roxborough v Michigan Unemployment Compensation Comm’n*, 309 Mich 505; 15 NW2d 724 (1944).

*Roxborough*, however, is distinguishable.

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<sup>10</sup>For this reason, the Amendment Provision is consistent with *McCartney v Attorney General* 231 Mich App 722; 587 NW2d 824 (1998), cited by the Court of Appeals. *McCartney* was cited for the proposition that the “product of the [Governor’s] negotiations [with a tribe] has no effect *without legislative approval*.” *TOMAC (On Remand)*, p 10 citing *McCartney*, 231 Mich App at 726-728 (emphasis supplied by the court); App at 25a. The Legislature, however, has agreed to the product of negotiations of Compact amendments where those negotiations conform to the procedure agreed upon in the Compact. Thus, the Amendment Provision is in accord with *McCartney*.

In *Roxborough*, the governor appointed the plaintiff to the appeal board of the unemployment compensation commission. The governor fixed the plaintiff's salary at \$25 per day for an average of 15 days per month up to \$4,500 per year. The authority of the governor to appoint the plaintiff and fix his salary derived from Michigan's unemployment compensation act, which required salaries to comply with the regulations of the federal social security board. Those federal regulations limited the plaintiff's salary to \$25 per day for no more than 13-1/2 days per month. The plaintiff, however, worked more days than were compensable and was not paid for the excess over the allowed amount.

The plaintiff sued to recover compensation for the extra days of work, arguing that the Governor's appointment created a binding contract on the part of the State to pay him \$25 per day up to \$4,500. This Court disagreed. This Court observed that "the governor could exercise only such authority as was delegated to him by legislative enactment." 309 Mich at 510. Accordingly, this Court looked to the "provisions of the unemployment compensation act" to determine the scope of the governor's statutory authority to fix salaries of appeal board members. *Id*, 309 Mich at 511. This Court concluded that "[f]rom our examination of the . . . provisions of said act, it is clear the legislature intended that the governor's authority . . . should be subject to the Federal social security board's regulation . . .", which did not allow the salary awarded by the Governor. *Id*.

The Court of Appeals interpreted *Roxborough* to hold that, generally, a governor may bind the State to a contract only if there is a statute (or a constitutional provision) expressly delegating that authority to the governor. But *Roxborough* did not go that far. In *Roxborough*, there already was a statute that delegated authority to the governor to fix

salaries; the *only* question presented was whether the *scope of the statutorily delegated power* covered the plaintiff's salary. This Court did not need to – and did not – reach the question of whether the Legislature could authorize the Governor to act on the State's behalf by means other than statutory, such as a resolution approving a State contract creating such authority. Thus, the Court of Appeals' expansive reading of *Roxborough* should be rejected.

In addition, *Roxborough* dealt with the *unilateral delegation* of the Legislature's contracting power. To force this case into the *Roxborough* mold, the Court of Appeals recast HCR 115 as an attempt by the Legislature to unilaterally delegate its "power" or "authority" to amend the Compact. See *TOMAC (On Remand)*, p 9, App at 24a ("Here the delegation of authority to amend a gambling compact was conferred by resolution, a nonstatutory means."). But that resolution did not purport to give the Governor the authority to amend the Compacts. Rather, it approved a contract that included among its terms specific substantive and procedural requirements for amending the Compact, including a provision giving the Governor authority to act for the State. HCR115 does not unilaterally *confer* the Legislature's contracting power on the Governor, but expresses the Legislature's *consent to a mutual amendatory procedure* giving the Governor the authority to act on behalf of the State.

Finally, the Court of Appeals' application of *Roxborough* to this case conflicts with this Court's opinion in *TOMAC I*. The Governor's amending authority derives entirely from the contractual agreement of the State and the Tribe as expressed in Section 16 of the Compacts. The Governor's exercise of that authority binds the State to an amendment

because *the parties agreed* that it would bind the State. That agreement is valid even though the Legislature did not approve it by statute since the constitution is silent on the method to be used by the Legislature to bind the State to a contract with a Tribe.

“[O]ur Constitution contains no limits on the Legislature’s power to bind the State to a contract with a tribe; therefore, because nothing prohibits it from doing so, given the Legislature’s residual power, we conclude that the Legislature has the discretion to approve the compacts by resolution.

*TOMAC I*, 471 Mich at 328 (footnote omitted). Consequently, the resolution approving the parties’ agreement giving the Governor authority to act for the State is sufficient under this Court’s decision in *TOMAC I*.

### **CONCLUSION AND RELIEF REQUESTED**

The Court of Appeals erroneously held that the Amendment Provision of the Compact constituted an unconstitutional delegation of legislative authority to the Governor in violation of the Separation of Powers Clause. Furthermore, the sole basis upon which the Court of Appeals invalidated the LTBB Amendment was that erroneous holding.<sup>11</sup>

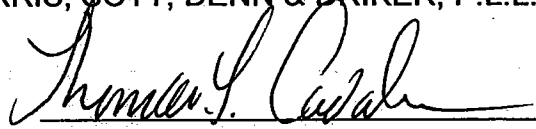
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<sup>11</sup>TOMAC also argued on remand that one specific provision of the LTBB Amendment, which permitted the Tribe to make payments to the State “as directed by the Governor or designee” (rather than solely to the MSF as required by the original Compact) was an unconstitutional appropriation of state funds. (LTBB Amendment, p 3; App at 880.) The Court of Appeals, however, declined to consider that argument and it is not raised by the State’s appeal. See *TOMAC (On Remand)*, p 12; App at 27a (“We decline to address plaintiffs’ additional arguments.”) TOMAC’s argument is entirely without merit. If TOMAC raises the argument in its own appeal, the State shall prove that it utterly fails to establish a constitutional infirmity.

Therefore, the State of Michigan asks this Court to reverse the Court of Appeals' decision that the Amendment Provision and the LTBB Amendment violate the Michigan constitution.

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